NO. _____

In the Supreme Court of the United States

REGINA THERESE DREXLER,

Petitioner,

v.

HON. THERESA SPAHN, IN HER OFFICIAL CAPACITY;
HON. CHELSEA MALONE, IN HER OFFICIAL CAPACITY;
DENVER COUNTY COURT, CITY AND COUNTY OF DENVER;

Respondents.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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JUNE 16, 2021

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QUESTIONS PRESENTED

1. Whether the First Amendment permits the issuance of a civil protection order to (i) punish a "pattern" of conduct where such conduct includes only protected speech and activities, or (ii) permits a civil protection order to act as a prior restraint of speech about a protected person?

2. Whether Section 1983 relief is available to remedy First Amendment violations arising from (i) punishment of "pattern" of conduct where such conduct includes only protected speech and activities, (ii) prior restraint of speech about a protected person, and (iii) punishment of appellate petitioning challenging such punishment and restraint, as well as Second Amendment and due process violations alleged but not addressed by the lower courts?

LIST OF PROCEEDINGS

Supreme Court of Colorado

Supreme Court Case No: 2020SA393

Regina T. Drexler, *Plaintiff-Appellant,* v. Honorable Theresa Spahn, Honorable Chelsea Malone, Denver County Court, and City and County of Denver, *Defendants-Appellees.*

Date of Final Order: March 18, 2021

United States District Court for the District of Colorado

Case Number: 2020CV30610

Regina T. Drexler, *Plaintiff,* v. Hon. Theresa Spahn, in her official capacity, et al., *Defendants.*

Date of Order: August 16, 2020

Date of Reconsideration Denial: October 2, 2020

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays for a writ of certiorari to issue to review the judgment below.

OPINIONS BELOW

The order of the Colorado Supreme Court, the highest state court to review the merits of the case, appears in the Appendix ("App.") at 1a to this petition and is published.

The orders of the state district court appear at App.3a, 17a, 20a to this petition and are unpublished.

JURISDICTION

The state district court entered its opinion and judgment on August 16, 2020 ("Order") at App.3a, entered its order on reconsideration on October 2, 2020 ("Reconsideration Order") at App.17a, and entered its order denying amendment to assert statutory facial challenge on November 17, 2020 ("Amendment Order") at App.20a.

The judgment of the state district court was affirmed without opinion by the Colorado Supreme Court on March 18, 2021. A copy of that order appears at App.1a. Reconsideration was not permitted by procedural rule.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). This petition is filed within 90 days of the Colorado Supreme Court's March 18, 2021 order.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are provided in relevant part.

CONSTITUTIONAL PROVISIONS

United States Constitution, First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Second Amendment

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.
>
> the right of the people to keep and bear Arms shall not be infringed.

United States Constitution, Fourteenth Amendment

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES

18 U.S.C. § 922(g)(8)

"It shall be unlawful for any person . . . who is subject to a court order that— . . .

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)

(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition

which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 921(a)(32) – (Select) Definitions

. . . The term "intimate partner" means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person. . . .

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

STATE STATUTES

Colo. Rev. Stat. § 13-14-105.5(1)(a)(I)

If the court subjects a person to a civil protection order pursuant to a provision of this article and the protection order qualifies as an order described in 18 U.S.C. sec. 922 (d) (8) or (g) (8), the court, as part of such order:

(a) Shall order the person to:

(I) Refrain from possessing or purchasing any firearm or ammunition for the duration of the order; and

(II) Relinquish, for the duration of the order, any firearm or ammunition in the respondent's immediate possession or control or subject to the respondent's immediate possession or control

Colo. Rev. Stat. § 13-14-104.5(1)(a)

Any municipal court of record . . . shall have original concurrent jurisdiction to issue a temporary or permanent civil protection order against an adult or against a juvenile who is ten years of age or older for any of the following purposes: . . .

(II) To prevent domestic abuse [and] . . .

(V) To prevent stalking.

Colo. Rev. Stat. § 13-14-106

. . . If upon such examination the judge or magistrate finds by a preponderance of the evidence that [first prong] the respondent has committed acts constituting grounds for issuance of a civil protection order and [second prong] that unless restrained will continue to commit such acts or acts designed to intimidate or retaliate against the protected person, the judge or magistrate shall order the temporary civil protection order to be made permanent or enter a permanent civil protection order with provisions different from the temporary civil protection order . . . .

Colo. Rev. Stat. § 13-14-101 – (Select) Definitions

> "Contact" or "contacting" means any interaction or communication with another person, directly or indirectly through a third party, and electronic and digital forms of communication, including but not limited to interaction or communication through social media.
>
> "Domestic abuse" means any act, attempted act, or threatened act of violence, stalking, harassment, or coercion that is committed by any person against another person to whom the actor is currently or was formerly related, or with whom the actor is living or has lived in the same domicile, or with whom the actor is involved or has been involved in an intimate relationship. A sexual relationship may be an indicator of an intimate relationship but is never a necessary condition for finding an intimate relationship . . . .
>
> "Stalking" means any act, attempted act, or threatened act of stalking as described in section 18-3-602, C.R.S.

Colo. Rev. Stat. § 18-3-602(c)

> A person commits stalking if directly, or indirectly through another person, the person knowingly:
>
> (c) Repeatedly follows, approaches, contacts, places under surveillance, or makes any form of communication with another person . . . in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress.

Colo. Rev. Stat. § 13-14-105(1)(f)

> (1) . . . any county court, in connection with issuing a civil protection order, has original concurrent jurisdiction with the district court to include any provisions in the order that the municipal or county court deems necessary for the protection of persons, including but not limited to orders: . . .
>
> (f) Restraining a party from interfering with a protected person at the person's place of employment or place of education or from engaging in conduct that impairs the protected person's employment, educational relationships, or environment.

Colo. Rev. Stat. § 13-14-105.5

> (1) If the court subjects a person to a civil protection order pursuant to a provision of this article and the protection order qualifies as an order described in 18 U.S.C. sec. 922 (d)(8) or (g)(8), the court, as part of such order:
>
> (a) Shall order the person to:
>
> (I) Refrain from possessing or purchasing any firearm or ammunition for the duration of the order; and
>
> (II) Relinquish, for the duration of the order, any firearm or ammunition in the respondent's immediate possession or control or subject to the respondent's immediate possession or control. . . .

STATEMENT OF THE CASE

On February 12, 2020, Ms. Drexler filed a complaint seeking relief from the state district court for violations of First Amendment, Second Amendment, and Fourteenth Amendment attendant to a civil protection order, including for void relief for First Amendment infringement and restraint of speech and petitioning and under Section 1983 for municipal liability for First Amendment, Second Amendment, and due process violations based on the failure to train/supervise.

The district court dismissed the claims for void relief and Section 1983 relief based on finding that there was no First Amendment infringement of speech because the order was designed to prevent "pattern of abuse" and not "all" speech was subject to prior restraint. App.7a, 9a-10a, 15a. The district court suggested the municipal court's sanctioning of lawful petitioning challenging such violation was erroneous but not void; however, the district court failed to address the same under Section 1983. App.11a-12a, 18a; *see* App.15a. No ruling was made on the Section 1983 claims for Second Amendment and due process violations. *See* App.15a. The district court refused amendment, requested prior to answer and reconsideration, to allege a statutory facial challenge. App.20a.

On direct appeal, the Colorado Supreme Court affirmed without opinion. App.1a. This petition for writ of certiorari follows.

STATEMENT OF FACTS

A. Punishment of Protected Activities as "Pattern" of Abuse.

A civil protection order was issued against Ms. Drexler in 2015 by a municipal court based on a finding of a "pattern of domestic abuse." App.92a, 94a. This "pattern" was based on the exercise of protected speech and activities which the court found amounted to "pattern of behavior to manipulate and intimidate" that "rises to the level of domestic abuse" ("Pattern Findings"). The Pattern Findings were:

(i) Ms. Drexler "wr[o]te two nonfiction stories (sic: literary essays)" about the protected person "in 2012." App.80a, 91a.

(ii) The literary essays were "so mean" because they "[told] confidences as friends" and "make the [confidences] public" and "destroy" the protected person and "certainly places a burden on her marriage." App.80a; 91a.

(iii) The literary essays were "mean" and "to upset [the protected person's] life." App.91a.

(iv) Ms. Drexler "read them at school, in a place where [the protected person] has to be around other parents" (but there was no record evidence that Ms. Drexler read them at school). App.81a, 91a.

(v) Ms. Drexler "wants to mediate" to "access" and "contact" the protected person in 2010. App.82a, 83a.

(vi) Ms. Drexler wrote a letter to counsel in 2010 "because she wants mediation." App.83a.

(vii) Ms. Drexler "wanted to depose" [the protected person in 2010] "to have some sort of contact" (where only request for deposition availability was made through counsel in third party litigation which resolved in Ms. Drexler's favor). App.83a, 91a.

(viii) Ms. Drexler "wants access" by going to a gym in 2009 because she "knows [the protected person] works out there" and "is in this [gym] class" (but it was undisputed Ms. Drexler went to the gym a single time at the invitation of a friend who was enrolled in class, in which protected person was not enrolled and did not attend, nor did parties see each other there). App.90a.

(ix) Ms. Drexler "wanted to participate" and "signed up" for a team design competition in October 2014 and elective in April 2015 that protected person "was teaching" (but it was undisputed that instructor was not assigned until after Ms. Drexler's enrollment and she pre-cleared such academic activities with the university, which found the same proper both before and after her enrollment). App.83a.

(x) The court "felt like" the protection order proceeding was to "have some sort of dysfunctional access" to "be around," and "yet another way" to "maintain contact" and "intimidate [the protected person] and to retaliate," also suggesting the same was "obsessive" (in support of statutory second prong). App.84a.

Nearly half of the Pattern Findings relate to Ms. Drexler's writing of literary essays and a 2011 public literary reading. There was no allegation or finding that any such nationally-recognized literary speech was threatening, obscene, false, or otherwise unlawful or improper. It was not. *See* App.107a.

Two of the Pattern Findings concern Ms. Drexler's expression of a willingness to mediate the parties' dispute directed to third parties in response to third party officials' request that the parties mediate; two others concern lawful petitioning, and two relate to protected activities not directed to the protected person.

Finding the First Amendment was not implicated as to the literary essays, the municipal court questioned Ms. Drexler extensively on the details of her essays and public reading and made numerous additional adverse findings about the essays and reading, including:

(i) Ms. Drexler "write[s essays] . . . to maintain contact with [protected person] and to keep intimidating her." App.94a.

(ii) Ms. Drexler "wr[o]te two non-fiction stories" that were "mean-spirited." App.80a.

(iii) The essays "were mean" because they "disclose all the confidences and secrets [parties] had as friends . . . publicly." App.80a.

(iv) Ms. Drexler read "about the mannequins at the school . . . where [parties'] children both went to school in front of other parents." App.81a.

(v) The public reading supports "obsession" with the protected person, in support of statutory second prong." App.81a.

(vi) The public literary reading was "very mean-spirited" because it "highlighted [parties'] relationship in front of parents and children (but undisputed reading did not reference protected party or parties' relationship and that children were not present). App.81a.

(vii) "Even if [Ms. Drexler] only read parts of it [about a mannequin], everybody knew [about parties' relationship]." App.81a.

(viii) The public reading "was so telling" and "said so much" because performing a public reading is "not consistent" with being a victim of domestic abuse. App.81a-82a.

(ix) Writing and publishing literary essays "is not consistent with being a victim of domestic abuse" (but sole expert witness testified that she encouraged abuse victim to write). App.84a.

(x) Ms. Drexler "started writing the stories about four years later", in 2013, supporting she is "really grieving" and "it is hard for [her] to move on" (in support of statutory second prong and contrary to finding that Ms. Drexler had written the essays in 2012 and contrary to undisputed record evidence that Ms. Drexler started writing the essays in 2010 and had completed them by 2011, they had been published them in academic literary journals in 2012 and 2013, and they had won

Best American Notable Essays Awards by 2013). App.84a.

Despite these findings, in which the court repeatedly cited Ms. Drexler's writing and publishing of two literary essays as a "pattern" of abuse to support issuing a civil protection order, the court stated, incongruously, that Ms. Drexler "can write" and "can publish." App.81a. The court made no similar inconsistent finding with respect to its repeated punishment of Ms. Drexler's public reading or her expression of a willingness to mediate (or as to any other protected activity cited in support of the order).

As to her expression of a willingness to mediate directed only to third parties in response to third-party requests that the parties mediate, additional court findings included:

(i) Ms. Drexler "wanted dysfunctional access" and was "trying to have some sort of contact" through mediation. App.82a, 83a, 90a.

(ii) "Flurry of activity" related to school's request that the parties' mediate to resolve the issue of "bullying" by protected party was "way to maintain contact." App.84a.

Despite finding Ms. Drexler had lawful reasons for engaging in the conduct underlying the Pattern Findings, the court nevertheless characterized such conduct as "efforts to make/maintain contact or access," "attempts to contact," "intimidation," "retaliation," and generally "years of continued contact" in support of issuing the civil protection order. App.82a, 83a, 92a, 93a, 94a. In doing so, the court did not consider or apply the controlling definition of "Contact" under

Colo. Rev. Stat. § 13-14-101, nor did any of the cited conduct meet such definition.

In making the Pattern Findings, the court relied on extraneous information contradicting the sole expert's testimony which supported Ms. Drexler, including from a non-testifying "expert" identified by the court as "Lundy Bancroft," "a lot of domestic abuse training," and "empirical studies and data", all cited to discredit the sole expert's testimony and to support the contrary finding that "all of [Ms. Drexler's] history falls in line with someone who is a domestic abuser." App.92a.

In making the Pattern Findings concerning the petitioning activity, the court also clearly erroneously found that no relief was provided by statute for educational interference: "Protection orders and this court are not about . . . disparaging people at work or school"; "Like somebody is saying bad things about you at [school] . . . and you needed all your therapy for that?"; "I don't know all what was said [by the protected person] at . . . School, but she can say those things;" "[The protected person] says bad things at the school about [Ms. Drexler]. So what?"). App.85a, 87a, 93a.

But Colo. Rev. Stat. § 13-14-105(1)(f) explicitly permits relief via civil protection order for educational interference. Just weeks prior, Ms. Drexler had obtained relief via temporary civil protection order for educational interference, including where the same judge found the allegations supported "definitely" and "especially domestic abuse." However, in the interim prior to the permanent protection order hearing, the judge evidenced bias in favor of the protected party's new counsel, finding, in a 14-minute

ex parte proceeding, as directed to the protected person:

> I don't need to take any testimony today;" "I will say that you have a very good attorney. She has a lot of credibility with this Court and, and I'm sure all the courts in Denver. And I feel it appropriate at this time to issue a Temporary Protection Order . . . based on the statements that have been made by counsel . . . I'm very concerned about your safety based on statements that have been made by counsel.

Several of the statements made by counsel to the court in the *ex parte* hearing were false, as later found by the court and admitted on cross examination by the protected party.

As issued, the civil protection order imposed a 10-foot distance restriction from the protected person, a 100-foot distance restriction from her home and vacation home, and proscribed the same conduct as the court characterized the protected speech and activities underlying the Pattern Findings, *i.e.*, contact, attempts to contact, domestic abuse, intimidation, and retaliation. App.95a.

B. Unconstitutional Firearm Ban.

The civil protection order also imposed a firearm ban under 18 U.S.C. § 922(g)(8) and Colo. Rev. Stat. § 13-14-105.5(1)(a)(I) without any review or finding that the protected person was an "intimate partner" under 18 U.S.C. § 921(a)(32) and where the protected party was not an "intimate partner." App.102a; App. 105a.

C. Order on Appeal Affirming Ruling on First Amendment and Due Process Violations and Reversing Firearm Ban.

Ms. Drexler appealed the 2015 order, alleging a First Amendment violation for punishment of protected speech, a due process violation for reliance on extraneous information, and an unconstitutional firearm ban. App.61a-62a, 64a. On September 16, 2016, based on misrepresentations of court findings, record evidence, and all controlling law-all of which went unrebutted due to the appellate court's refusal of reply briefing-the court applied an abuse of discretion review standard, failed to apply all controlling constitutional law, and affirmed. App.56a.

In affirming, the appellate court found the cited protected speech was not entitled to First Amendment protection because it (i) was "properly considered . . . evidence of harassment" and (ii) was not relied on to support a prohibited act under the statutory first prong of Colo. Rev. Stat. § 13-14-106 but instead only to support "ongoing obsession and fixation" under statutory second prong-which finding itself was explicitly based on the clearly erroneous factual finding that Ms. Drexler "started writing" the essays in 2013 (where she had started writing them in 2010, they had been published in literary journals and received national essay awards by 2013). App.62a-63a.

Also applying the wrong evidentiary rule, applicable to jurors applying common, non-specialized knowledge, instead of to judges relying on extraneous expert information, and failing to otherwise address the alleged due process violation, the appellate court

found that the municipal court's reliance on the specialized and expert extraneous information was proper. App.61a-62a.

The appellate court reversed the unconstitutional firearm ban on September 16, 2016. App.64a-67a. However, despite reversal, the municipal court refused to remove the firearm ban for another year and a half, maintaining the same on Ms. Drexler until February 14, 2018. App.47a.

There were no adverse findings by the appellate court concerning any arguments presented on appeal and no remand. Ms. Drexler requested certiorari to the Colorado Supreme Court and this Court, but both courts denied certiorari without making any adverse findings about the arguments presented.

D. Further Punishment of Protected Activities.

As permitted by state statute, Ms. Drexler requested dismissal of the civil protection order after two years, citing the constitutional errors as well as overwhelmingly favorable dismissal factors. In response to a motion to recuse, the 2015 judge reassigned the matter to another judge. The successor judge ruled that the hearing would "focus on" dismissal factors and the court "would not entertain argument" on the constitutional issues, explicitly also later stating that she "was not interested in the validity of the First Amendment claims." The court also refused to permit telephone testimony of two expert witnesses offered in support of Ms. Drexler and, over objection, did not require the protected person's to appear at the hearing for cross-examination.

The 2018 municipal court thereafter punished Ms. Drexler for "continuing litigation" through "appeal and certiorari." App.41a. Despite finding full compliance with the protection order otherwise, the 2018 court refused dismissal, issued a substantially expanded protection order, and made a significant fee award, to sanction "continued litigation," *i.e.*, the partially successful appeal and certiorari requests raising the constitutional violations, finding generally that all of the same was substantially groundless, frivolous, and vexatious, and "to harass" the protected person. App.35a, 41a. Thus, based explicitly on the "continued litigation" through "appeal and certiorari," the court made a fee award exceeding $108,000 for all fees in all concluded proceedings from 2015 through 2018, including those reviewed and concluded without adverse findings in higher courts, and also to be made "without a hearing" in contravention of all controlling law. The court also failed to make the requisite statutory findings to support the fee award. App.44a.

The court refused to dismiss, issued the expanded protection order, and made the fee award also explicitly based on Ms. Drexler's literary essays and public reading. These findings included:

(i) Ms. Drexler "authored and read a non-fiction piece about protected person to parents at [school]" (where the record evidence and prior 2015 finding was that the reading was not "about" the protected person). App.28a.

(ii) Ms. Drexler made a "painful publication of essays . . . about [parties'] relationship" which "supports that [she has] an obsession." App.41a.

The court questioned Ms. Drexler on her protected speech, requiring her explicit assurance of prior restraint and suggested the protection order was properly used to restrain speech and may be continued by the court to prevent her literary speech "from crossing that line right back into harassment/stalking."

In support of the order, the court also cited that Ms. Drexler "dysfunctionally" "s[ought] mediation", where the record evidence was only that she expressed a willingness to mediate to third parties in response to third-party official requests that the parties mediate. App.28a.

The court also found the 2015 Pattern Findings constituted a finding of "Stalking from 2008 through 2015," "Stalking under the criminal code," and "following." App.28a, 29a-30a, 42a. This was clearly erroneous given that none of these findings were made by the 2015 court and were also explicitly contradicted the 2015 Order and the 2016 Appeal Order finding that such protected activities were not considered "prohibited acts" under the first statutory prong but were relied on only to support "obsession and fixation" under the second statutory prong. App.62a-63a. The 2018 court also deemed the requisite statutory findings for "Stalking" unnecessary, including findings of "serious emotional distress" by the protected person and a reasonable person, and also clearly erroneously found the 2015 court "made clear findings that [Ms.] Drexler did in fact stalk or attempt to stalk [the protected person] as defined by the criminal code," and also sanctioned her for "not accepting accountability" therefor. App.29a-30a, 43a. The 2018 municipal court also erroneously found the 2015 court "noted a pattern of filing and litigation used to

terrorize" the protected person. App.40a. This was also clearly erroneous as to prior findings. No such finding was made, and even the 2015 municipal court found that Ms. Drexler genuinely believed she a victim of the protected person's abuse. App.79a.

The 2018 court issued a substantially expanded protection order as to distance and location restrictions and which also restrained the same conduct as the protected speech and activities were characterized by both the 2015 and 2018 municipal courts, *i.e.*, contact, attempts to contact, domestic abuse, retaliation, intimidation, stalking, following, and harassment. App.45a-48a.

E. Order on Appeal Affirming Further Punishment of Protected Activities.

Through experienced appellate counsel, Ms. Drexler filed an emergency petition to the Colorado Supreme Court, which denied discretionary relief. Ms. Drexler also appealed the 2018 municipal order to the state district court. Again, the answer brief on appeal was replete with misrepresentations of court findings, record evidence, and controlling law, which all were again left unrebutted because requested reply briefing was again refused. Thus, failing again to apply the required appellate review standard and all controlling law as to the constitutional issues presented, the substantially expanded order and fee award were affirmed by the district court on December 5, 2019. Ms. Drexler requested certiorari to the Colorado Supreme Court, but it was denied.

F. District Court Order Denying Relief for Constitutional Violations.

Having been unsuccessful in obtaining relief for the serious constitutional violations through standard appellate procedures, Ms. Drexler filed a complaint with the district court on February 12, 2020, seeking, in part, void relief for punishment and restraint of protected speech and activities under the First Amendment and Section 1983 relief for violations of the First Amendment, Second Amendment, and due process based on the same particular allegations set forth herein.[1]

The state district court again failed to conduct *de novo* review of the alleged constitutional violations and relied on the municipal courts' prior orders to find no First Amendment violation. App.8a-9a. Based on finding no First Amendment violation, the district court also dismissed the claim for void relief and also dismissed the Section 1983 claim without ruling on any other issue. App.9a-10a, 15a.

1. First Amendment Violations

As to the First Amendment claim, the district court found:

(i) the allegations of First Amendment violations "fail to reach any level of plausibility" because the 2015 and 2018 orders "do not intrude on" and "were not impermissibly

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[1] Ms. Drexler also sought habeas relief, but the court dismissed that claim, finding that, because she was entitled to seek dismissal of the protection order after the habeas petition was filed, she had not exhausted available remedies and she stated no plausible claim for First Amendment infringement. App.5a-6a.

based on . . . exercise of First Amendment rights. App.7a.[2]

(ii) Ms. Drexler is "merely prohibited" from "contact with" the protected person and orders do not "otherwise intrude on her protected First Amendment Activities" because the orders were "tailored" to prevent "patterns of abuse" and "manipulation and intimidation" and "all statements" are not restrained, and the orders "do nothing to preclude Ms. Drexler from publishing written materials" or "from bringing credible claims to the courts." App.7a, 9a-10a.

(iii) "[N]o plausible demonstration of 1st amendment rights was shown . . . what does exist is conclusory legal statements, unfounded [which] are insufficient to support the pleading . . . " App.17a.

As to the punishment of First Amendment petitioning, including as to matters presented to higher courts on "appeal and certiorari," the district court suggested that the municipal court erred in punishing the same via fee award but found that such punishment was not "void." App.11a-12a, 18a. The district court did not address such erroneous punishment of lawful petitioning under Section 1983. *See* App.15a.

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[2] The allegations of First Amendment violations, as presented to the district court, were substantially the same as set forth herein, including the detailed factual allegations and record cites supporting the claim.

2. Second Amendment Violation

The district court did not address the Second Amendment violation under Section 1983 as particularly alleged for unlawful imposition and refusal to lift the firearm ban for a year and a half after reversal thereof on appeal. *See* App.15a.

3. Due Process Violations

As to certain of the due process violations, the state district court found:

(i) the judicial statements in favor of the protected person's counsel and her purported "credibility" and related decision not to require supporting evidence to issue a protection order based thereon do not support "a reasonable inference" of "bias or prejudice" and "most likely reflect her personal opinion . . . " App.13a-14a.

(ii) the 2018 court did not make any "new findings" of law or fact. App.10a.

The district court did not address the other due process violations as particularly alleged in support of Section 1983 relief, including improper judicial reliance on extraneous information or refusal of reply briefing. *See* App.15a. Citing inapplicable case law, the district court also refused to allow Ms. Drexler to amend the complaint to assert a statutory facial challenge as to the undefined act of "harassment",

despite that she moved to amend prior to answer and reconsideration. App.20a.[3]

4. Colorado Supreme Court Review

On direct appeal to the Colorado Supreme Court, the municipal defendants made material misrepresentations to the court, including: (i) falsely representing that the 2015 municipal court did not rely on First Amendment activities in issuing the protection order, which had no basis in fact and was explicitly contradicted by the 2016 Appeal Order; and (ii) falsely representing that Ms. Drexler's request to amend to assert a facial statutory challenge was not made until after denial of reconsideration, which statement was false, as evident by the record fact that the motion to amend was filed prior to reconsideration, which was decided thereafter, on October 2, 2020. App.17a.

Without opinion, the Colorado Supreme Court affirmed dismissal. App.1a. Reconsideration was not permitted by procedural rule. Ms. Drexler seeks review on certiorari to remedy the First Amendment infringement and restraint, as well as the Second Amendment and due process violations.

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[3] As explained, Ms. Drexler did not initially allege a facial challenge because the as-applied violations seemed clear.

REASONS FOR GRANTING THE PETITION

I. THE QUESTIONS PRESENTED INVOLVE IMPORTANT CONSTITUTIONAL QUESTIONS WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This Court has not addressed First Amendment protections in the context of civil protection orders. Without such guidance, lower courts across the country are imposing and affirming significant restrictions on individual liberty and freedom via such orders on many hundreds of thousands of American citizens each year. According to the Federal Bureau of Investigation, even twenty years ago, at least 600,000 to 700,000 people in the United States were subject to permanent protection orders. *See* Report, Institute for Law and Justice, *National Evaluation of Legal Assistance* (2005) (excluding information from eight states that did not report). This estimate increased substantially by 2011, *i.e.*, "[g]iven the trend to increasing [issuance]," the "best estimate of permanent restraining orders . . . issued each year is 900,000." Stop Abusive & Violent Env'ts, *Special Report: The Use and Abuse of Domestic Restraining Orders*, at 8 (Feb. 2011) (estimating annual issuance of approximately 900,000 permanent restraining orders.). The National Center for State Courts and state-published statistics suggest that the 2008 national annual estimate for the issuance of civil protection orders was actually between 1.2 and 1.7 million. *See Restraining Orders Issued and in Effect in the U.S.*, https://www.acrosswalls.org/statistics/restraining-orders/.

Due to the lack of centralized public reporting, it is difficult to know how substantially these numbers have increased over the last 10-15 years. However, there are clearly many hundreds of thousands of citizens whose fundamental constitutional rights are the subject of substantial imposition by municipal courts who have little knowledge or experience in applying constitutional protections. "Restraining orders are easy to obtain because state laws now define domestic violence broadly, judges seldom require proof of abuse, and statutes invoke a 'preponderance of evidence' standard." *The Use and Abuse of Domestic Restraining Orders*, at 1. Civil protection orders are "granted to virtually all who apply" and are increasingly often used for "tactical advantage", for "gamesmanship" and are a "widely used litigation strategy." *Id. See also* David H. Taylor et al., *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has Eased the Possibility for Abuse of the Process*, 18 KAN. J.L. & PUB. POL'Y 83, 86-87 & n.15 (2008) (noting that protection orders are granted routinely at an extraordinarily high rate).

Further, higher court review is difficult and often impossible to secure due to the discretionary nature of review by higher courts, as well as the inherent distaste for review of these types of matters and common misperceptions about the types of people on whom such orders are imposed. *See also* A. Caplan, *Free Speech and Civil Harassment Orders*, 64 HASTINGS L.J. p. 781, 845 (2013) (protection order litigation is "conducted within a structure that pressures judges to issue injunctions and lowers the safeguards we ordinarily rely upon to prevent constitutional error," due to the lack of discovery,

procedural protections, judicial inexperience with constitutional issues, etc.); E. Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 Stan. L. Rev. 1049 (2000); *One-To-One Speech vs. One-To-Many Speech, Criminal Harassment Laws and Cyberstalking*, 107 N.W. U. L. REV. 731 (2013); L. Kohn, *Why Doesn't She Leave? The Collision of First Amendment Rights and Effective Court Remedies for Victims of Domestic Violence*, 29 HASTINGS CONST. L. Q. 19 (2001) (all calling for a uniform standard for First Amendment protections in the context of civil protection orders).

II. THE DECISIONS BY THE LOWER COURTS WERE WRONG AND CONFLICT WITH DECISIONS OF THIS COURT AND OTHER STATE AND FEDERAL COURTS.

Not only are the issues presented in this Petition important for this Court to address given the widespread use and substantially increasing number of people affected each year by civil protection orders, including for "tactical" and "strategic" purposes, the constitutional errors by the lower courts here have been substantial, and such errors have been repeated and compounded over time. Intervention by this Court is necessary to address the substantial deviations from constitutional precedent by the lower courts here.

A. The First Amendment Does Not Permit the Issuance of a Civil Protection Order to Punish a "Pattern" of Conduct Where Such Conduct Includes Only Protected Speech and Activities, Nor Does It Permit a Civil Protection Order to Act as a Prior Restraint of Speech Concerning a Protected Person.

Based on the same factual allegations of First Amendment violations as set forth herein, the district court found that they "failed to reach any level of plausibility" because the 2015 and 2018 orders "do not intrude on" and "were not impermissibly based on . . . exercise of First Amendment rights." App.7a. It also found that the specific factual allegations asserted constituted only "conclusory legal statements . . . " App.17a.

The district court found the orders do not "intrude on [Ms. Drexler's] protected First Amendment Activities" because they were "tailored" to prevent "patterns of abuse" and "manipulation and intimidation" and because not "all statements" are restrained, also finding they "do nothing to preclude Ms. Drexler from publishing written materials" or "from bringing credible claims to the courts." App.7a, 9a-10a.

These findings not only demonstrate common misperceptions about protection orders,[4] they are also clearly erroneous.

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[4] *See* A. Caplan, *Free Speech and Civil Harassment Orders*, at 845 ("Some judges may believe that [a protection order] imposes no serious hardship . . . However, significant collateral consequences attach upon entry of an order, including future legal consequences, enforcement errors, restricting access to places and people, adverse background checks, firearms restrictions and social

If factual allegations support a plausible claim for relief, dismissal is improper. *Ashcroft v. Iqbal*, 556 U.S. 662,663 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,555-56 (2007) ("formulaic recitation" of elements insufficient); *see also Baumann v. O'Neil,* 2015 U.S.Dist.LEXIS 115465 *11-14 (D.Colo. 2015) (motion to dismiss First Amendment claim is properly denied where speech is subject to protection and at least some of the speech substantially motivated punishment).

As particularly alleged as set forth above: (i) the 2015 court repeatedly punished protected speech and activities, including by characterizing the same as a "pattern of domestic abuse," "contacts," "attempted contacts," "intimidation," and "retaliation," and citing same to support "obsession and fixation" to support the statutory second prong; (ii) the 2016 court on appeal affirmed that punishing the exercise of protected activities did not violate the First Amendment where the protected activities were relied on only to support "obsession and fixation" under the second statutory prong rather than as "prohibited acts" under the first statutory prong; and (iii) the 2018 court also characterized the Pattern Findings, comprised of protected speech and activities, as "Stalking" and "following," which are "prohibited acts" under the first statutory prong; (iv) the 2018 court also explicitly punished lawful petitioning and protected activities by issuing the expanded order and making the fee award based thereon. The 2018 court also made a new finding that the reading was "about [the protected

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stigmatization;" litigation is "conducted within a structure that pressures judges to issue [orders] and lowers safeguards . . . rel[ied] upon to prevent constitutional error.")

person] . . . which "supports that [Ms. Drexler has] an obsession," where such finding was contrary to the 2015 finding and the undisputed record evidence.

Thus, it is clear that the lower courts repeatedly relied on First Amendment activities to support "prohibited acts" under the first statutory prong. Notwithstanding that fact, however, even if were the case that the lower courts relied on First Amendment activities only to support the second statutory prong based on "obsession and fixation", such punishment of thoughts is patently unconstitutional. *Stanley v. Georgia,* 394 U.S. 557, 565-66 (1969); *Paris Adult Theatre v. Slaton,* 413 U.S. 49, 67-68 (1973).

Further, there was no "tailoring" of the orders; moreover, any such "tailoring" would be nevertheless be unconstitutional for any speech even absent restraint of "all" speech. "A municipal government . . . has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2226-7 (2015); *Gooding v. Wilson*, 405 U.S. 518, 523 (1972) (punishment of speech is unconstitutional if not within narrow recognized exceptions); *Baumann* *7, 14 ("[I]t goes without saying that a governmental official may not [punish] . . . speech protected by the First Amendment . . . "); *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (speech about private persons is protected); *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 909-10 ("Speech does not lose its protected character . . . simply because it may embarrass others . . . "); *see also Thompson v. Bear Runner*, 916 N.W.2d 127, 130 (S.D. 2018) ("course of conduct" does not obviate constitutional protections for underlying conduct, vacating protection order); *Chan v. Ellis*, 770

S.E.2d 851, 854 (Ga. 2015) (vacating order where speech about, but not directed to, person); *Buchanan v. Crisler*, 922 N.W.2d 886, 904 (Mich.App. 2018) (vacating protection order where communications were not directed to protected person).

The repeated punishment of Ms. Drexler's exercise of protected rights chilled the exercise thereof. It is a matter of common sense, as supported by all constitutional precedent, that people refrain from conduct for which they are repeatedly punished. *See Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right."); *Gooding*, p. 522 (where speech is punished, "persons whose expression is constitutionally protected may well refrain from exercising their rights . . . "); *Alexander v. U.S.*, 509 U.S. 544, 551 (1993) ("[L]egal impediment to expressive activity is tantamount to prior restraint . . . "). A prior restraint of speech is "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

Further, a plausible claim for First Amendment infringement requires only that "at least some" of the alleged protected activity "substantially motivated punishment." *Baumann v. O'Neil,* 2015 U.S.Dist. LEXIS 115465 *11-14 (D.Colo. 2015). The particular allegations here go well beyond the requirement that "at least some" of the alleged protected activities "substantially motivated" punishment; indeed, as particularly alleged, such activities were the principal basis therefor.

The orders also constitute direct prior restraint because they restrain the same conduct as the protected

speech and activities were repeatedly characterized by the lower courts. Even if the 2015 order was initially only arguably vague given the 2015 court's contrary suggestion as to some of the conduct cited as a part of the purported "pattern" of abuse, *i.e.*, that Ms. Drexler "can write" and "can publish", any vagueness was resolved by the 2018 court's repeated punishment of the same protected activities and its further suggestion in the hearing that the protection order was properly used as a prior restraint of literary speech to prevent it "from crossing that line right back into harassment/stalking." Moreover, standards of "permissible statutory vagueness are strict in the area of free expression." *Keyishian v. Board of Regents*, 385 U.S. 589, 609-10 (1967) ("The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform [writers and speakers] what is being proscribed."); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

Further, the district court suggested that the 2018 municipal court's punishment of "appeal and certiorari" was erroneous but found it was not void based on *King v. Everett*, 775 P.2d 65, 66 (Colo. App. 1989) (where fee award was erroneous but not void based on the fact that the order was supported by the existing law at the time it was entered, the opposite of the case here). App.11a-12a, 18a. Despite this, the district court did not consider or rule on the erroneous punishment of such lawful petitioning under Section 1983. *See* App.15a.

Finally, amendment to allege a First Amendment violation based on a statutory facial challenge was

denied where, contrary to the misrepresentation by the municipal defendants, the request to amend was made prior to answer and reconsideration. App.20a. In refusing to permit amendment in the early stages of litigation, where amendment was not futile, the district court abused its discretion.

B. Section 1983 Relief Is Available to Remedy First Amendment Violations Arising from (i) Punishment of "Pattern" of Conduct Where Such Conduct Includes Only Protected Activities, (ii) Prior Restraint of Speech About a Protected Person, and (iii) Punishment of Appellate Petitioning Challenging Such Punishment and Restraint, as Well as Second Amendment and Due Process Violations Which Were Not Addressed by the Lower Courts.

The district court dismissed the 42 U.S.C. § 1983 claim, finding no plausible First Amendment violation, and thus "nonexistent constitutional injury" could not support claim for municipal liability. App.15a. The court did not make any other findings with respect thereto, nor did it consider or address the alleged Second Amendment and due process violations under Section 1983.

Relief is available under § 1983 where government officials violate constitutional rights. *Nieves v. Bartlett*, 139 S.Ct. 1715, 1718 (2019); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 684 (1978) (Section 1983 "was intended to provide a remedy, to be broadly construed [for all forms of] violation of federally protected rights"). A protection order satisfies the state action requirement and implicates constitutional protections. *Clouterbuck v. Clouterbuck*, 556 A.2d 1082, 1085 n. 3

(D.C. 1989) ("There is no question that the government's involvement in the issuance of a [protection order] rises to a level that satisfies the state action requirement of the Due Process Clause."), citing *Tulsa Professional Collection Servs. v. Pope*, 485 U.S. 478 (1988).

Although a local government is not liable solely on *respondeat superior* under Section 1983, liability arises "when execution of a government's policy or custom . . . inflicts the injury," as alleged here, from a municipal failure to train and supervise. *Waller v. Denver*, 932 F.3d 1277, 1288 (10th Cir. 2019); *Ramsey v. Sw. Corr. Med. Grp.*, 2019 U.S. Dist. LEXIS 120753 *41-43 (D.Colo. 2019) (one specific factual allegation is sufficient to prevent dismissal of municipal liability claim).

1. First Amendment Violations.

As set forth above, Ms. Drexler stated a plausible claim for First Amendment infringement and restraint, satisfying *Iqbal* and *Twombly*. Particularly, as required by *Baumann*, Ms. Drexler alleged that her speech was subject to First Amendment protection and such speech substantially motivated punishment. Ms. Drexler further stated plausible claims under Section 1983 for Second Amendment violation and due process violations, but no consideration was given thereto.

2. Second Amendment Violation.

The Second Amendment provides, "the right of the people to keep and bear Arms shall not be infringed." Despite this constitutional right, 18 U.S.C. § 922(g)(8) allows a person subject to a civil protection order to be prohibited from possessing a firearm and ammunition where such order is issued in favor of an

"intimate partner" and certain additional conditions are met under Section 922(g)(8)(C)(1) or (C)(2).

Here, the 2015 municipal court imposed a firearm ban on Ms. Drexler attendant only to issuance of a civil protection order under Colo. Rev. Stat. § 13-14-105.5(1)(a) without undertaking any analysis or making any findings as to whether the federal statute allowed Ms. Drexler's Second Amendment rights to be proscribed. App.102a. As found in the 2016 Appeal Order, the imposition of a firearm proscription on Ms. Drexler was unlawful. App.64a-67a.

This Court has not reviewed the constitutionality of Section 922(g)(8)'s firearm proscription with regard to a civil protection order. Arguably, such a proscription of Second Amendment rights is unconstitutional, particularly given that (i) a civil protection order proceeding is expedited such that substantive and procedural protections, which are typically relied on to prevent constitutional violations, are not provided, and (ii) such orders are issued based only on a preponderance of evidence standard.

Certain federal circuits have presumed the constitutionality of Section 922(g)(8) based on this Court's finding in *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008) that "an individual right to keep and bear arms is subject to limits, including, for example, "longstanding prohibitions on possession of firearms by felons" which are "presumptively lawful regulatory measures"). However, *Heller* is not logically extended to the civil protection order context. Moreover, even the courts finding the statute's firearm ban facially constitutional have been explicit that the constitutionality of such proscription is dependent on the person being "subject to qualifying order" and only as "strictly

limited" by the duration of the continuing order. *United States v. Bena*, 664 F.3d 1180, 1184 (8th Cir. 2011); *United States v. Chapman*, 666 F.3d 220, 230 (4th Cir. 2012).

Here, not only did the statute not apply to permit a firearm ban on Ms. Drexler under Section 922(g) for any period of time because the protected person was not an "intimate partner," the municipal court also refused to lift the ban for over a year and a half despite reversal of the order on appeal. App.47a. Despite particularly alleging these facts in support of Second Amendment infringement claim for Section 1983 relief, the district court dismissed the claim without ruling thereon. *See* App.15a.

3. Due Process Violations.

The Fourteenth Amendment of the United States Constitution in relevant part provides: "No state . . . shall deprive any person of life, liberty, or property, without due process of law . . . "

In dismissing Section 1983 relief, the state district court did not address certain of the alleged due process claims. The court addressed two of the violations, finding: (i) as to judicial bias, that the judicial statements do not support "a reasonable inference" of "bias or prejudice" and "most likely reflect her personal opinion . . . " (App.13a-14a), and (ii) as to the new findings of fact and law, that no new findings were made." App.10a. These findings were clearly erroneous.

In 2016, this Court made clear that improper failure to recuse where "unconstitutional potential for bias" violates due process. *Williams v. Pennsylvania*, 136

S.Ct. 1899, 1905 (2016). "Quite simply and quite universally, recusal is required whenever impartiality might reasonably be questioned." *Liteky v. United States*, 510 U.S. 540, 548 (1994); *see Rippo v. Baker*, 137 S.Ct. 905, 907 (2017) (judgment vacated); *U.S. v. Franco-Guillen*, 2006 U.S. Dist. WESTLAW 2879063 *2-3 (10th Cir. 2006) (vacating order where comments would cause reasonable person to doubt impartiality).

The *ex parte* statements of the 2015 court cannot reasonably be assessed to lack impartiality where the judge assured the protected party she had "a very good attorney," who "has a lot of credibility with this Court . . . and I'm sure all the courts in Denver," and the statements evidenced that the judge decided not to require any testimony or other evidence to support the emergency order based on the "statements of counsel" she deemed "credible."

"Credibility" statement by the judge was made after factual representations by counsel who lacked personal knowledge as to same; "credibility" determination as to statements was thus improper. Also, as later found and admitted during hearing testimony, counsel was then presenting false information to the court. Despite this, the court found "no need" for supporting evidence and issued emergency protection order based on counsel's false statements she deemed "credible."

The statements were also derived from information outside the proceeding, which commenced at 9:49 A.M. and adjourned at 10:03 A.M.; fourteen minutes provided insufficient time or opportunity for the judge to form an opinion as to skill and credibility of counsel sufficient to vouch for same on the record and issue an emergency order based thereon. Also, the judge's

assessment that counsel had "a lot of credibility" with "all the courts in Denver", on which she also relied, could not have derived from proceeding. *See Bell v. Chandler*, 569 F.2d 556, 560 (10th Cir. 1978) (where judge should have disqualified, any order issued is properly vacated).

Ms. Drexler also plausibly alleged that the new findings of fact and law made by the 2018 municipal court violated due process. Before a court makes new legal and factual findings, due process requires an opportunity to respond after notice is provided. *Clev. Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985); *Rock v. Arkansas*, 483 U.S. 44, 50 (1987) (the right to present testimony in defense of allegations is protected by due process).

The district court did not address the other due process violations particularly alleged in support of Section 1983 relief, including improper judicial reliance on extraneous information and refusal of reply briefing. *See* App.15a.

Here, the court relied on the outside "expert" and specialized information set forth above in discrediting the only qualified expert witness and in making findings to support the civil protection order. App.92a. Extraneous information is inherently less trustworthy because it has not benefited from the safeguards of the judicial process intended to weed out unreliable evidence, such as the rules of evidence and cross-examination. *See Crawford v. Washington*, 541 U.S. 36, 61 (2004) (cross-examination important in ensuring reliability of evidence); *See also* K. Liska, *Experts in the Jury Room,* 69 STAN. L. REV. 911, 921 (2017) ("In light

of lack of procedural safeguards, courts have consistently agreed that extraneous information threatens the due process rights.").

Finally, in each underlying appeal, the requested reply briefs were refused. Failure to allow reply briefs violates due process and the right to petition. Reply briefs are permitted in direct appeal in all other matters in civil and criminal courts at the federal and state level. Even where the right to appeal is statutory, procedures must nevertheless comport with due process. The opportunity to respond is essential to due process. *Loudermill*, p. 546 (1985); *see U.S. v. Andrews*, 2012 U.S. Dist. LEXIS 179244 *5 (N.D.IL 2012) (due process may require that reply briefs be permitted on direct appeal). The district court did not address this allegation made in support of Section 1983 relief. *See* App.15a.

CONCLUSION

To address the important matters and constitutional violations presented herein, Petitioner respectfully requests that this Supreme Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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JUNE 15, 2021

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